Office-Supreme Court, U.S.
FILED
FEB 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-2399, No. 82-358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY,
and PENNSYLVANIA ELECTRIC COMPANY, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS METROPOLITAN EDISON COMPANY, ET AL.

JAMES B. HAMLIN
Counsel of Record
GEORGE F. TROWBRIDGE
JOHN B. RHINELANDER
DEBORAH B. BAUSER
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000
Attorneys for Petitioners Metropolitan Edison Company, et al.

Of Counsel:
JAMES B. LIBERMAN
DEBEVOISE & LIBERMAN
26 Broadway
New York, NY 10004
(212) 248-6900

February 22, 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. PANE Has Shown No Environmental Nexus Between Psychological Distress And Operation Of TMI-1	2
II. The Potential For An Accident At TMI-1 Was Thoroughly Considered By The NRC	5
III. The Lower Court Precedent Does Not Support PANE's Position	8
IV. The Difficulties Inherent In Predicting Stress Cannot Be Ignored In Deciding This Case	12
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975) 7

Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378 (2d Cir. 1975) 10, 11

Como-Falcon Coalition, Inc. v. United States Department of Labor, 465 F. Supp. 850 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) 11

Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) ("*Hanly I*") 8-9, 11, 12

Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) ("*Hanly II*") 8, 9, 10, 12, 15

Maryland-National Capital Park & Planning Comm'n v. United States Postal Service, 487 F.2d 1029 (D.C. Cir. 1973) 14, 15

Porter County Chapter of the Izaak Walton League v. AEC, 533 F.2d 1011 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976) 7

Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396 (1961) 5

Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973) 14

MISCELLANEOUS:

10 C.F.R. Part 2 (1982) 18

Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, 45 Fed. Reg. 40,101 (June 13, 1980) 6, 7

Proceedings of the Workshop on Psychological Stress Associated with the Proposed Restart of Three Mile Island, Unit 1, NUREG/CP-0026 (April 1982) 13, 16, 17

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980) .. 12-13

R. Holt, A Selective Review of Research on Health Effects of the Accident at Three Mile Island (undated) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2399, No. 82-358

METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY,
and PENNSYLVANIA ELECTRIC COMPANY, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS METROPOLITAN EDISON COMPANY, ET AL.

Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company, petitioners in No. 81-2399 (hereinafter "Public Utilities"),[1] submit this reply brief in response to the brief

---

[1] In compliance with Supreme Court Rule 28.1, the parent and affiliate corporations of the Public Utilities were listed on page i of their petition for a writ of certiorari.

on the merits filed by respondent People Against Nuclear Energy ("PANE").

ARGUMENT

I. PANE Has Shown No Environmental Nexus Between Psychological Distress And Operation Of TMI-1

PANE's brief goes through a series of verbal gymnastics in an attempt to demonstrate some environmental nexus between the psychological stress it alleges and operation of TMI-1. The effort merely confuses the facts and muddles the issues actually presented by this case. PANE concedes that NEPA does not apply to "a health effect, *per se*, independent of an environmental nexus" and that the health effect somehow must be "environmentally generated." PANE Brief at 38, 21. In order to meet this requirement, PANE defines "environment" as the geographic area surrounding Three Mile Island" (*id.* at 25), and it argues that restart of TMI-1 will change this environment by renewing the "potential for a nuclear accident and further exposure to radiation." *Id.* at 23. PANE believes that this "potential" constitutes the "physical reality" and "inherent nature" of the environment (*id.* at 29, 38), and that the potential will "cause the local environment to threaten human health." *Id.* at 15. This threat arises through "the initial fear reaction" in PANE's members, leading to "severe" psychological health damage. *Id.* at 21. PANE disavows any desire to evaluate "fears or perceptions" in and of themselves, and it argues that fears and perceptions are relevant only as the "immediate causal link between the alteration of the human environment at TMI and the resulting health damage." *Id.* at 20. Nevertheless, the causal link provided by these fears and perceptions is so strong that PANE cannot "imagine a tighter chain of proximate cause between the effect on the physical environment and the damage to human health." *Id.* at 31.

To say that this case involves an "effect" on the "physical reality" of the "environment" is to give those words an entirely new meaning. Everyone agrees that we are *not* concerned here with the actual physical impacts of normal reactor operation, such as release of low-level radiation, discharges of heated water, local fogging caused by the cooling towers, and the like. Those impacts were thoroughly considered in the environmental impact statement ("EIS") prepared at the time TMI-1 was initially licensed and again during the restart proceeding in the environmental impact appraisal ("EIA"). *See* Joint Appendix (J.A.) at 48-87. The EIA concluded, of course, that renewed operation of TMI-1 would not result in any significant impacts beyond those previously considered in the EIS. PANE makes no attempt to link its alleged psychological distress with these physical impacts of normal operation.

Nor does this case concern the actual danger of an accident at TMI-1. The prospects for an accident were thoroughly considered at the time TMI-1 was licensed and again during the restart proceeding. Indeed, the whole purpose of the restart proceeding was to consider the potential for another accident like the one that occurred at TMI-2 and to apply to TMI-1 the lessons learned from the accident. Yet PANE declined to participate in this exhaustive consideration of the actual risk of an accident. In fact, it is PANE's view that the actual safety of TMI-1 is irrelevant to its psychological stress contentions in this case. *See* PANE Brief at 30 n.53.

Thus there is no nexus with the physical impacts of normal operation or with the actual risk of an accident at the plant. When PANE speaks of the "potential" for an accident, it can only be referring to the potential as it is

feared or *perceived* by PANE's members.[2] This perceived potential cannot be characterized, in any meaningful sense, as the "physical reality" or "inherent nature" of the environment surrounding TMI-1.

Similarly peculiar is PANE's suggestion that the environment will be changed in a way that will cause it "to threaten human health." The environment around TMI-1 after restart will be no more "threatening" than it was while TMI-1 was in operation before the accident. The only change is in the state of mind of PANE's members, and the threat to their psychological health, if any, comes from their own fears and perceptions, not from the environment in which they live. Unless the human mind is to become the "environment" for NEPA purposes, it cannot be said that the stress alleged here is "environmentally generated."

When the elaborate legal formulations are stripped away, this case is really quite straightforward. PANE's members are afraid of an accident at TMI-1, yet they declined to participate in an exhaustive proceeding designed to ensure that the actual risk of such an accident is acceptably low. Instead, they would have the NRC analyze and evaluate the effects of their fears and perceptions in and of themselves, wholly apart from the actual risk involved. NEPA was never intended to require any such analysis.

---

[2] PANE's *amicus*, the American Psychological Association ("APA"), confirms that psychological stress "results from a person's *perception* of his environment." APA Brief at 4 (emphasis added). The stress bears no necessary relationship to the physical reality of the environment.

II. The Potential For An Accident At TMI-1 Was Thoroughly Considered By The NRC

PANE asserts that it is the Public Utilities' position that an accident like the one at TMI-2 "could not occur again" and that therefore "the potential for such an accident should not be considered in deciding whether TMI-1 should be restarted." PANE Brief at 31; *see also id.* at 32 n.57. This is a gross mischaracterization of our views and is directly contrary to the actual facts of this case. No one can absolutely guarantee that an accident will never occur at a nuclear power plant. But no such guarantee is required. The NRC fulfills its statutory obligations if it finds reasonable assurance that the plant can be operated without undue risk to the health and safety of the public. *See Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396 (1961). To that end, the NRC conducts an exhaustive safety review of each nuclear plant, including an analysis of the likelihood and consequences of various types of accidents. TMI-1 was subjected to such a safety review at the time it was initially licensed. During the restart proceeding the safety of TMI-1 was again considered, with particular focus on the likelihood of another accident like the one that occurred at TMI-2 and the measures taken to prevent a repetition.

Neither the NRC nor the Public Utilities have *ever* argued that the potential for an accident should be ignored in deciding whether to restart TMI-1. To the contrary, it is our position that if PANE was truly concerned about the actual safety of TMI-1, it could have participated in the restart proceeding, aired its concerns, and assisted the NRC in determining whether there is reasonable assurance that the plant can be operated safely. Yet PANE has steadfastly refused to participate in this process, preferring instead to litigate its fear of an

accident without regard to the actual safety of the plant. The Public Utilities' position on this issue is simple: The actual safety of TMI-1 should be, and has been, considered by the NRC; PANE's perceptions and fears about the safety of the plant should not be considered.

PANE's *amicus* Union of Concerned Scientists ("UCS") launches a similar attack against the NRC, arguing that the Commission proposes to allow restart of TMI-1 without a full public airing of the potential for another accident. UCS Brief at 6.[3] UCS seeks to buttress its argument by reference to a recent NRC Policy Statement governing the treatment of so-called "Class 9" accidents in the EIS's prepared for nuclear power plants. *See* Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, 45 Fed. Reg. 40,101 (June 13, 1980). UCS' presentation confuses the issues presented here and requires clarification.

The NRC has *always* considered the probability and consequences of accidents in its NEPA impact statements for nuclear plants. For example, in the EIS for TMI-1 and TMI-2 the NRC considered a broad range of accidents grouped into classes according to probability and severity, including some accidents with off-site radiological consequences more serious than those expe-

---

[3] The UCS brief is for the most part an attempt to prove that the TMI-2 accident was a serious one. No one has ever disputed that the accident was serious. *See* Public Utilities Brief at 3. The only point made by the Public Utilities was that any stress in the surrounding population was caused primarily by erroneous information concerning the hydrogen bubble and supposedly high radiation releases, not by the release of dangerous quantities of radioactive material. Public Utilities Brief at 4. UCS' focus on the accident scenario, including events that might have but did not occur and were unknown to the public, is irrelevant for purposes of this case. Such information could not have caused stress.

rienced in the TMI-2 accident.[4] Until 1980, however, the NRC's EIS's did not consider in any great detail a category of very serious accidents known as Class 9 accidents, which were thought extremely unlikely to occur. The NRC's practice of omitting detailed consideration of Class 9 accidents was approved by the courts. *Porter County Chapter of the Izaak Walton League v. AEC*, 533 F.2d 1011, 1017-18 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976); *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 799-800 (D.C. Cir. 1975).

In its 1980 Policy Statement, the Commission prospectively reversed its practice with respect to Class 9 accidents. Thereafter, the mathematical probability and the consequences of such accidents were to be considered in NEPA impact statements, but only for proceedings in which the EIS had not already been issued. *See* 45 Fed. Reg. at 40,103. Because the EIS for TMI-1 had already been issued years earlier and because the potential for serious accidents had been thoroughly considered in the TMI-1 restart proceeding, the NRC did not prepare a new or supplemental EIS discussing Class 9 accidents at TMI-1. Nevertheless, the EIA prepared by the NRC during the restart proceeding did discuss Class 9 accidents, including the Commission's Policy Statement and the evidence presented at the hearing on this subject. J.A. 58-60. The NRC testimony at the hearing was described as follows:

> Staff members Jack Rosenthal and Paul S. Check prepared testimony, presented at the hearings on January 28, 1981, which showed, using Class 9 acci-

---

[4] *See* NRC, Final Environmental Statement Related to the Operation of Three Mile Island Nuclear Station, Unit 2, NUREG-0112, at 7-1 to 7-6 (Dec. 1976); NRC, Final Environmental Statement Related to Operation of Three Mile Island Nuclear Station, Units 1 and 2, at VI-1 to VI-10 (Dec. 1972) (attached as Appendix B to NUREG-0112).

> dent scenarios, design basis events, credible vs. incredible events and deterministic vs. probablistic reviews (including safety goals), that the design of nuclear power reactors provides protection against a range of Class 9 accidents and that protection has been provided for TMI-1 for those events with nexus to the TMI-2 event.

J.A. 59-60. The NRC Appeal Board has recently issued an opinion sustaining the decision not to prepare an EIS covering Class 9 accidents. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-705 (Dec. 10, 1982).[5]

Thus there *has* been a full public airing of the potential for serious accidents at TMI-1, including Class 9 accidents. It is highly misleading to suggest that the NRC is attempting to sweep this issue under the rug and allow restart of TMI-1 without an adequate review of all pertinent safety issues.

III. The Lower Court Precedent Does Not Support PANE's Position

PANE's reliance on several decisions by the circuit courts of appeals is entirely misplaced.

Notwithstanding PANE's suggestion to the contrary,[6] the decisions by the Second Circuit in *Hanly v. Mitchell*,

---

[5] In any event, PANE never contended below that Class 9 accidents should have been considered in a formal EIS. Thus the issue of Class 9 accidents is not properly before this Court.

[6] *See* PANE Brief at 27-28. Previously, PANE distinguished the *Hanly II* case from the present controversy on the ground that *Hanly II* did not involve allegations of "actual damage to human psychological health." PANE Brief in Opposition to Petitions for Writs of Certiorari at 34. At that time, PANE acknowledged that the Second Circuit had questioned whether "vague psychological considerations" such as general concern or uneasiness are cognizable under NEPA. *Id.*

460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) (*"Hanly I"*), and *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (*"Hanly II"*), actually demonstrate that psychological distress based upon individuals' fears and perceptions is not cognizable under NEPA. In *Hanly I*, the court found that the "terse" one or two page memorandum prepared by the General Services Administration ("GSA") failed to satisfy the agency's obligation under NEPA to take a "hard look at the peculiar environmental impact of squeezing a jail into a narrow area [in Manhattan] directly across the street from two large apartment houses." 460 F.2d at 646. The court found that some of plaintiffs' expressed concerns, *e.g.*, increased noise and traffic, inmate demonstrations and an increased availability of drugs in the neighborhood, "all affect the urban 'environment' and are surely results of the 'profound influences of . . . high-density urbanization [and] industrial expansion.' Section 101(a) of the Act, 42 U.S.C. § 4331(a)." *Id.* at 647. Although not the traditional environmental assets such as forests, lakes and wildlife, the factors that the court found cognizable under NEPA were the *actual* attributes of the urban area at issue in *Hanly I*.

Thus, in *Hanly I* the underlying environmental bases for city residents' fears and concerns had to be evaluated by GSA in determining whether an EIS for the proposed jail was required by NEPA. In the present case, the underlying bases for PANE's concerns—the impact on health and safety of operating TMI-1—have been analyzed in exhaustive detail in an extraordinarily lengthy public adjudicatory hearing. In contrast to what PANE would require of the NRC here, the agency in *Hanly I* was not required to analyze the feelings of neighboring residents about the federal project in question.

The court in *Hanly II* found GSA's new twenty-five page environmental review for the most part satisfactory. However, it required GSA to go back and include in the assessment an analysis of the potential for a rise in crime in the neighborhood, an issue overlooked by GSA in its rewritten environmental report. While PANE valiantly attempts to bring its facts within the analytical rubric of the *Hanly II* case, the fact remains that the Second Circuit did not require GSA to assess people's fears about crime; rather, the agency was told to evaluate the actual safety issue of crime incidence attributable to the construction and operation of the prison in the neighborhood. The latter issue is an actual urban phenomenon that the court thought attributable to the presence of the jail in the community. The former issue, in the words of *amicus* APA, "results from a person's perception of his environment," and not from the environment itself. APA Brief at 4. In sum, contrary to PANE's assertion, the lesson to be learned from *Hanly II* is that psychological stress is not an environmental impact cognizable under NEPA.[7]

PANE also relies upon the Second Circuit's decision in *Chelsea Neighborhood Associations v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975). In *Chelsea*, the court disagreed with the Postal Service's position that

---

[7] PANE also summarily distinguishes a series of NEPA cases concerning so-called "secondary impacts" on the theory that "[n]one of these cases presents a fact situation at all similar to that now before the Court." PANE Brief at 29 & n.51. Of course, PANE is simply ignoring the rule adopted in those cases, namely, that any agency need not consider the indirect effects of a major federal action absent a direct—often termed "primary"—impact on the physical environment. If such indirect impacts do not trigger NEPA's EIS requirement, surely PANE's admittedly "indirect" claim is not within NEPA's bounds. PANE Brief at 11. PANE also notes that "none of

it was either exempt from NEPA or had already prepared a sufficient EIS in connection with a proposal to build a huge multi-story postal garage in Manhattan, on top of which would sit a multi-story housing project. While the court found that the environmental impacts of the proposed garage had been comprehensively assessed, the impacts of the housing project had not. Neither had the Postal Service addressed the impact of building the garage and not the housing project, although the latter was presented in the EIS as the major community benefit of the proposed project. In addition, the EIS failed to discuss alternatives comprehensively. Relying on its holding in *Hanly I*, the court focused particularly on the absence of any discussion in the EIS of such "human factors" as crime. Insofar as the court was concerned about the effect on the housing project's occupants of "living at the top of an 80-foot plateau," this stemmed from the hypothesis that if these people were isolated from the rest of the community, the housing project could become a "human jungle," which would "exacerbate the predicted rise in crime." 516 F.2d at 388. In *Chelsea* the court did *not* require the agency to analyze the stress of neighborhood residents produced by their perceptions and apprehensions about the project. *See also Como-Falcon Coalition, Inc. v. United States Department of Labor*, 465 F. Supp. 850, 861 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) (fears of increased crime from the establishment of a Job Corps center are

---

these cases involves a federal action that would fundamentally change the physical reality of the surrounding environment." *Id.* at 29. But neither does the normal operation of TMI-1. As discussed above, this case does not involve any change in the "physical reality of the surrounding environment." The change is not in the environment, but in the minds of some individuals who will be distressed if TMI-1 is allowed to operate.

not cognizable under NEPA since "[t]he incidence of crime as an environmental impact cannot be determined by a comparison of emotional fervor").

In summary, the case law ran decisively against PANE's position until the court below decided this case. Even Judge Wright could find no support in these cases, and he simply distinguished them as involving mere "socioeconomic anxieties." 678 F.2d at 229 (Pet. App. 15a). Ironically, PANE's *amicus*, the American Sociological Association ("ASA"), joins us in rejecting the distinction that Judge Wright attempted to draw. ASA Brief at 3 n.1. In the end, PANE cannot escape the force of *Hanly* and the other cases holding that psychological stress is not cognizable under NEPA.

IV. The Difficulties Inherent In Predicting Stress Cannot Be Ignored In Deciding This Case

PANE makes much of the Public Utilities' discussion of the difficulties inherent in predicting stress, arguing that the measurability of stress is an issue for determination by the agency based on a factual record.[8] PANE Brief at 33-37. On several counts, PANE's argument misses the mark.

---

[8] It is one thing for PANE to argue that in deciding the legal question presented by this case, the Court must accept at face value PANE's allegations of psychological health effects. It is a wholly different proposition for PANE to make representations that independent studies have established the existence of "post-traumatic health impairments." PANE Brief at 5 n.14. Without seeking to propel the factual question of stress levels at TMI into this arena, the Public Utilities nevertheless must make it clear that they strongly disagree with PANE's claims about stress around TMI. None of the independent post-TMI-2 accident studies of stress has presented any evidence of distress of the seriousness of post-traumatic stress disorder, as that disorder is described in the Diagnostic and Statistical

The significance of the measurability problem or, more precisely, the prediction problem is that it represents another very practical reason for not interpreting NEPA to encompass the assessment of psychological stress. The Public Utilities previously described in detail the difficulties in quantification and proof of the completely individualistic and synergistic phenomenon of stress. *See* Public Utilities Brief at 34-38. These problems are enormously compounded by the need to predict future levels of stress in a community of people affected daily by myriad private and public events.[9]

Manual of Mental Disorders (3d ed. 1980) repeatedly referred to by PANE in its brief. *See* PANE Brief at 21 n.37, 30 n.53, 36 n.63. This fact is even acknowledged by PANE's consultant, Robert Holt, who has observed that the evidence adduced by the TMI surveys represents "an increase in mild demoralization, not the precipitation of diagnosable standard mental disorders." R. Holt, A Selective Review of Research on Health Effects of the Accident at Three Mile Island (forwarded to the Commission staff by PANE's counsel on May 12, 1982) at 24-25.

[9] PANE apparently does not dispute this fact, for it acknowledges that "the examination of psychological health matters is not simple, and even knowledgeable experts have limited ability to make reliable predictions." PANE Brief at 43. PANE contends, however, that "this is precisely the kind of case in which it is well within the competence of the scientific community to make a reasonable prediction of the reactions of a population to an impending event." PANE Brief at 36 n.63. In support of this claim, PANE cites two papers by its own consultants, neither of which explains in any way how to go about making such predictions. PANE also ignores the position taken by the group of experts who participated in a workshop convened by the NRC and attended by PANE's counsel on the psychological stress impact of restarting TMI-1. In the experts' view, it was possible that "the uncertainty of the predictions could be so high that [the experts] would not be willing to make them at all." NUREG/CP-0026, Proceedings of the Workshop on Psychological Stress Associated with the Proposed Restart of Three Mile Island, Unit 1 at xiv (April 1982) (hereinafter "Workshop Proceedings").

PANE's *amicus*, the APA, devotes a significant portion of its brief to the issue of measurability. APA Brief at 6-19. Notably, however, almost all of this discussion, including the numerous cited authorities, applies only to the measurement of past or present levels of stress, and not to the prediction of future stress. *See, e.g.*, APA Brief at 10-17 (discussion of four basic approaches to the measurement of psychological health effects of stressful events). Scant attention is paid to the issue of prediction. In fact, the APA cites only two authorities, authored in whole or in part by one of PANE's consultants, Robert Holt, to support their view that a "goal" of psychology is to predict future behavior. APA Brief at 18-19. PANE also relies upon the sort of scientific evaluations that are described by the APA, and to that extent, PANE also pays short shrift to the perhaps impossible task of predicting stress. PANE Brief at 36 n.63. *See* n.9, *supra*.

Furthermore, NEPA's requirement that the agency describe the anticipated environmental effects of proposed action must be subject to a "rule of reason." *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). The predictions PANE would require by their very nature extend that rule far beyond its previously applied limits. Such an extension is not only a congressional prerogative, *see* 678 F.2d at 239, 253 (Pet. App. 38a, 68a) (Wilkey, J., dissenting), but is also a relevant consideration in determining whether Congress intended NEPA to apply to future stress reactions of residents living near proposed major federal actions. In *Maryland-National Capital Park & Planning Comm'n v. United States Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973), Judge Leventhal addressed this very issue in rejecting the applicability of NEPA to esthetic impacts, which, "[l]ike psychological factors . . . 'are not readily translatable into concrete measuring rods.' " *Id.*

1038, *quoting Hanly II, supra*, 471 F.2d at 833 n.10. In the court's view, the difficulties in measuring psychological and esthetic phenomena

> have a bearing on the intention of Congress, and whether it contemplated, for example, a requirement of a detailed "environmental impact statement," and concomitant investigation, because of the possibility that each new Federal construction would be ugly to some, or even most, beholders, on such issues as: Is this proposed building beautiful? Or, what is the esthetic effect of placing the "controversial" Picasso statue in front of the Civic Center building in Chicago? These types of problems lead us to conclude that a "substantial inquiry" or "hard look" was not contemplated, as a matter of reasonable construction of NEPA, where the claim of NEPA application is focused on alleged esthetic impact and the matters at hand pertain essentially to issues of individual and potentially diverse tastes.

478 F.2d at 1038-39 (citation and footnote omitted). *See also* 678 F.2d at 254 (Pet. App. 69a) (Wilkey, J., dissenting) (Congress did not intend NEPA to constrain federal action on these "psychological and emotional bases").

In summary, the difficulties inherent in predicting stress provide another reason why the scope of NEPA ought not to be expanded to include this phenomenon. Certainly, these difficulties support our conclusion that Congress did not intend NEPA to apply to the psychological impacts alleged by PANE.

V. Affirmance Of The Lower Court's Decision Would Impose Substantial Burdens On The NRC

PANE attempts to minimize the burden and difficulty of compliance with the court of appeals' judgment. PANE argues that the NRC could prepare an assessment of psychological stress on the basis of "available information"; that the NRC could determine from the

assessment that no EIS is required; that PANE would be "strongly discouraged" from seeking judicial review of an EIS prepared by the NRC; that the EIS need not affect the NRC's restart decision; that, in the final analysis, the lower court's decision at most requires nothing more than preparation of an EIS; and that, in "considering this issue," the NRC was not required by the lower court "to use any particular procedures." PANE Brief at 40-41. PANE's efforts to soft-pedal the impact of the decision below are disingenuous and completely inconsistent with what PANE has been arguing before the Commission.

Contrary to its position here, PANE has insisted before the Commission that the evaluation of psychological stress could not go forward without further predictive studies, including clinical evaluations. PANE Response to Licensee's Motion with Respect to Psychological Health Issue, at 5 (filed with the Commission June 3, 1982) (hereinafter "PANE Response"). PANE's consultant, Robert Holt, has described in greater detail the kinds of predictive studies that he believes are necessary. *See* Workshop Proceedings at 86-89. Mr. Holt would conduct new surveys of the population within a 55-mile radius of TMI-1, with special samples of subgroups such as pregnant women, mothers, "unemployed breadwinners" and "poor minority group members." He would ask the population a long series of questions concerning their psychological symptoms, their beliefs in the safety of TMI-1, their "general level of alienation," their "trust and faith in basic institutions," their "social support network," their "feeling of competence vs. helplessness," and their "overall feeling about the desirability of restart." Mr. Holt would then make his predictions by the following method:

> The basic method of prediction would be, then, to follow this model: Suppose that in a certain sector of

> the population 15% of those who reported that TMI was "extremely dangerous" reported having headaches "often." The predictive study would ask a new sample of that same subpopulation, "How dangerous do you feel TMI would be to you if unit 1 is restarted—extremely dangerous . . . not dangerous at all?" For those who replied, "extremely dangerous," the prediction would be that 15% of them would develop frequent headaches.

Id. at 86-87. Thus, by PANE's own account, the studies necessary to predict stress would be a substantial and complicated undertaking.

Similarly misleading is PANE's suggestion that the NRC could prepare an environmental assessment finding that no EIS is necessary. PANE has already advised the Commission that, in PANE's view, any such course of action "would be arbitrary and capricious in the extreme." PANE Response at 4. It is a foregone conclusion that PANE would be back in the court of appeals in a matter of days if the NRC decided no EIS was necessary.

PANE also implies that the lower court's judgment requires only an EIS at most and that if the NRC prepared such a document, the controversy would be at an end. Yet before the Commission, PANE has asserted that it is entitled to an adjudicatory, trial-type hearing after a draft EIS has been issued, public comments have been obtained, and the EIS has been published in final form. PANE Response at 5-19.[10] Under NRC regulations, such a hearing entails use of discovery, opportunity for numerous procedural motions, hearing testimony and cross-examination, proposed findings of fact and conclusions of law, preparation of an initial decision by a Licensing Board, and review of that decision by an

---

[10] PANE also believes that such a hearing would be required even if the NRC decided that no EIS was necessary. PANE Response at 18.

Appeal Board and the Commission itself. *See* 10 C.F.R. Part 2 (1982). And we know from PANE's Preliminary Plan for Presentation of Evidence on Psychological Distress that it expects to present extensive testimony by expert witnesses and by "individuals concerning their own experiences." J.A. 26. PANE's ultimate objective, of course, is to keep TMI-1 shut down permanently.[11] If the hearing process results in anything less than a complete shut-down, it is likely that PANE will again seek the aid of the court of appeals in achieving its goal. Even if PANE is unsuccessful in obtaining a permanent shut-down, the NEPA process will have delayed restart for a period of many months or even years.

In short, PANE's position in this case, endorsed by the court of appeals, is well calculated to keep TMI-1 shut down and tied up in litigation for the indefinite future. That result can only be avoided through a prompt reversal by this Court.

---

[11] It is PANE's expressed belief that "preventing restart is the best means of mitigating" psychological stress. PANE Brief at 20 n.35. *See also* materials cited in Public Utilities Brief at 31 & n.30.

CONCLUSION

The Amended Judgment of the court of appeals should be reversed, and the case should be remanded with instructions to deny PANE's Petition For Review.

Respectfully submitted,

JAMES B. HAMLIN
Counsel of Record

GEORGE F. TROWBRIDGE
JOHN B. RHINELANDER
DEBORAH B. BAUSER
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000
Attorneys for Petitioners
Metropolitan Edison Company, et al.

Of Counsel:
JAMES B. LIBERMAN
DEBEVOISE & LIBERMAN
26 Broadway
New York, NY 10004
(212) 248-6900

February 22, 1983